No. 06-1380

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In The

Supreme Court of the United States

ESTATE OF ELLA M. PARKER,

Petitioner,

v.

SEDONA GOLF RESORT, L.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner's "Question Presented" is premised on a misleading assessment of the Ninth Circuit's Memorandum Decision. The real question presented is whether Petitioner has demonstrated any compelling reason to grant the Petition where the Ninth Circuit merely ruled that the bankruptcy court did not abuse its discretion in declining to apply the doctrine of judicial estoppel, and nothing in that ruling conflicts with a decision of this Court or any court of appeals.

CORPORATE DISCLOSURE STATEMENT

SunCor Development Company, an Arizona corporation, is the managing member of Respondent Sedona Golf Resort, L.C., an Arizona limited liability company. Pinnacle West Capital Corporation, an Arizona corporation, is the parent company of SunCor Development Company and has issued shares to the public.

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SUMMARY OF REASONS FOR DENYING THE PETITION

Respondent opposes a writ of certiorari because: (1) the factual context and record in this case does not support Petitioner's assertion that the Ninth Circuit has adopted a rigid, *per se* rule regarding the doctrine of judicial estoppel, and (2) Petitioner's assertion of a "clear circuit split on an important issue," Pet. at 1, regarding judicial estoppel does not hold up to a basic reading of the legal authorities cited by Petitioner. The decisions below in this case analyze and apply the doctrine of judicial estoppel consistent with the law of this Court and the other circuit courts. After considering the facts of record in this case, the bankruptcy court, sitting as trial court, found that Respondent's alleged prior inconsistent position was presented in a different context as part of a different legal theory that ultimately was rejected on appeal. On the basis of its full inquiry into the record, the bankruptcy court necessarily concluded there was no risk that admission of the allegedly inconsistent evidence at trial would, or did, undermine judicial integrity. The Ninth Circuit merely ruled that the bankruptcy court did not abuse its discretion in declining to apply the doctrine of judicial estoppel against Respondent. It did not adopt or enunciate a *per se* rule contrary to this Court or any other circuit court.

STATEMENT OF THE CASE

A. Overview of the Bankruptcy Court Proceedings.

The lengthy course of the litigation before the bankruptcy court from which this matter arises is described in detail in the extensive history set forth in the August 22,

2003 Under Advisement Decision Re: Trial found in Petitioner's Appendices at 16a-40a. That history need not be repeated in this Response, as little of it is relevant to the Petition. Rather, the background provided here focuses on the proceedings directly relevant to Petitioner's contention regarding the doctrine of judicial estoppel.

The Petition continues Petitioner's quest to overturn a quiet title determination made by the bankruptcy court after a full evidentiary trial on the merits, now affirmed by two appellate courts. Notably, this dispute, along with numerous other related proceedings, controversies, motions and witnesses, was before the bankruptcy court over a ten-year period. Pet. App. at 17a-23a. Prior to trial of the title dispute, the bankruptcy court provided both parties with detailed and ample notice of the legal issues on which it would receive evidence as well as a roadmap of the legal framework for the trial. *Id.* at 22a-23a; 51a-56a.

At trial, Petitioner failed to present evidence sufficient to persuade the bankruptcy court as trier of fact that Petitioner held title to the disputed roadway because of a mutual mistake. *Id.* at 35a-39a. Based on the evidence presented, the bankruptcy court quieted title in Respondent. *Id.* at 40a.

B. Bankruptcy Court Reject's Application of Judicial Estoppel.

In its considered post-trial decision, the bankruptcy court expressly rejected the assertion that Petitioner did not need to present evidence of the alleged mutual mistake because it was entitled to have the doctrine of judicial estoppel applied against Respondent to meet its burden of proof. *Id.* at 35a-39a. Petitioner urged the application of

judicial estoppel based on a patchwork of purported admissions of counsel and statements from pleadings made and filed by Respondent much earlier in the case when Respondent argued for summary judgment based on a legal theory that subsequently was rejected on appeal. *See id.* at 21a, n. 10 (listing the purported prior inconsistent statements on which Petitioner sought to impose estoppel). The bankruptcy court rejected judicial estoppel because in its analysis: (1) the statements and assertions did not rise to the level of admissions regarding the specific issue asserted by Petitioner, *id.*; (2) the statements considered in their proper context did not relate to the same issue that was before the court at trial, *id.* at 21a-22a; and (3) the statements, even if admissions, were made in pursuit of a legal theory based on alternative facts that was overturned on appeal. *Id.* at 36a. In short, based on the facts in the record, the court before which this matter was pending for ten years, and which conducted a trial on the merits, did not perceive a threat to judicial integrity from any of the evidence or arguments presented by Respondent. *See id.*

C. The Ninth Circuit's Ruling on Judicial Estoppel.

The Ninth Circuit ultimately affirmed the decision of the bankruptcy court, and, on the specific facts of this case, found no abuse of discretion in the bankruptcy court's rejection of the doctrine of judicial estoppel. *Id.* at 3a. The Ninth Circuit did not enunciate a *per se* rule. It did not preclude a trial court from examining facts in a different case where a risk of inconsistent court determinations or an unfair advantage would undermine judicial integrity.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with a decision of this Court or any court of appeals. Accordingly, Petitioner has not carried its burden of demonstrating a "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

A. The Ninth Circuit Is in Accord with this Court that there Is Flexibility in the Application of Judicial Estoppel.

Petitioner argues that the Ninth Circuit has adopted a rigid, *per se* rule that precludes application of the doctrine of judicial estoppel as a matter of law if the initial judicial acceptance of the allegedly inconsistent position is subsequently reversed on appeal or otherwise overturned. Pet. at 2, 11. The Petition is remarkably lacking, however, in citation to Ninth Circuit authority to support this proposition; and, rather, refers more frequently to a 1989 opinion from the Sixth Circuit.[1]

The Memorandum Decision of the Ninth Circuit in this case, on the other hand (designated Not for Publication), points out that Respondent's private plat dedication theory was ultimately rejected on appeal; that Respondent gained no "unfair advantage" from advancing this argument; and that based on the facts presented there was no risk of inconsistent determinations. Pet. App. at 3a. The court of appeals then concluded that the bankruptcy court

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[1] *Coal Res., Inc. v. Gulf & W. Indus., Inc.*, 865 F.2d 761 (6th Cir. 1989). This decision pre-dates *New Hampshire v. Maine*, 532 U.S. 742 (2001), by more than twelve years, and therefore is of questionable relevance to whether there *currently* is a split among the circuits.

did not abuse its discretion in declining to apply the doctrine of judicial estoppel against Respondent. *Id.*

One of the two Ninth Circuit cases cited in the section of the Memorandum Decision discussing judicial estoppel (the only other case cited being *New Hampshire v. Maine*, *supra*) was *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001).[2] In *Hamilton*, a debtor received a discharge in bankruptcy court based on a schedule that inaccurately listed his assets. Thereafter, on motion of the trustee, the bankruptcy was dismissed and the discharge vacated. Subsequent to that, the former debtor filed suit seeking to recover on a claim that should have been listed on the schedule of assets. The defendant moved for summary judgment arguing that the claimant was judicially estopped from pursuing the claim *even though* the discharge by the bankruptcy court had been vacated. The motion was granted, and on appeal, the Ninth Circuit affirmed, stating, "[t]his court has restricted the application of judicial estoppel to cases where the court relied on, or 'accepted,' the parties previous inconsistent position." 270 F.3d at 783 (citations omitted). The *Hamilton* court then noted, under the circumstances presented by that case:

> Our holding does not imply that the bankruptcy court must actually discharge debts before the judicial acceptance prong may be satisfied. The bankruptcy court may "accept" the debtor's assertions by relying on the debtor's non-disclosure of potential claims in many other ways.

Id. at 784 (citation omitted).

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[2] A case, it will be seen, rather conspicuously *not* cited in the Petition.

Thus, even though the debtor's discharge in *Hamilton* was later vacated, the Ninth Circuit had sufficient flexibility to apply judicial estoppel to foreclose his subsequent claim. The doctrine of judicial estoppel in the Ninth Circuit, therefore, is neither rigid nor *per se* as Petitioner suggests with respect to the "judicial acceptance" factor.

B. There Is No Conflict Among the Circuits as Suggested by Petitioner.

Two cases are cited by Petitioner, one from the Seventh Circuit and another from the Eighth Circuit, in support of the argument that the Federal Courts of Appeal are "sharply split" on this issue. Pet. at 2, 9-10. As it turns out, the first case dealt with a "novel issue," and apparently is *sui generis*; and the second implies a flexibility in the application of judicial estoppel that the Ninth Circuit in *Hamilton v. State Farm Fire & Cas. Co., supra,* specifically approved. Neither case presents a "sharp split" among the circuits that must be resolved by this Court.

In the first case cited by Petitioner, *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir. 2004), a settlement class was stipulated to by the parties and approved by the court, and judgment was entered accordingly that also enjoined other class actions then pending against the defendants. On appeal, the settlement was disapproved and the case remanded back to the district court for further proceedings. Thereafter, the defendants argued that the putative class was unmanageable and should not be certified. *Id.* at 659. After the class was certified over defendants' objection, an appeal was taken. The court of appeals, noting that, "[t]hese are novel issues whose prompt resolution is important to the development

of the law of class actions as well as the resolution of the present case," *id.* at 658, approved use of judicial estoppel to preclude defendants' argument opposing class certification even though it previously had reversed the district court's approval of the settlement class. *Id.* at 660. In doing so, it was important to the appellate court that " . . . the defendants benefited from the temporary approval of the settlement, which they used to enjoin other . . . litigation against them. . . ." *Id.*

It appears that *Carnegie* is the only time the Seventh Circuit has addressed the "novel issues" presented there. In *Crosby v. Bowater Inc. Ret. Plan for Salaried Emples. of Great N. Paper, Inc.*, No. 05-C3478, 206 U.S. Dist. LEXIS 67144 (N. D. Ill. Sept. 1, 2006), a district court in that circuit discussed and explained the decision in *Carnegie* as follows:

> To be sure, on one (and seemingly only one) occasion, the Seventh Circuit has also explained that a scenario in which a litigant prevailed on a position in the district court, and that position was subsequently repudiated by the court of appeals, still potentially could ground a basis for the application of judicial estoppel.
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> * * *
>
> The Seventh Circuit in *Carnegie* stressed the fact that the parties to be estopped there "reaped a benefit" from the position they asserted in the prior litigation; thus, judicial estoppel was equitably applied because "they cannot now be permitted to seek a further benefit from reversing their position." *Carnegie*, 376 F.3d at 660. Precedent stresses the importance of this "benefit" to the judicial estoppel analysis.

Id. at *23, *26.

As to the second case relied on, Petitioner judiciously introduces *Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006), with the signal, "*see also.*" Pet. at 2. In *Stallings*, the Eighth Circuit implied, but did not hold, that a debtor may be judicially estopped from pursing a subsequent claim that was not scheduled as an asset even though the bankruptcy discharge is later vacated. Specifically as to *Stallings*, Petitioner argued as follows in the Petition:

> The Eighth Circuit's decision in *Stallings v. Hussmann Corp.* follows a similar approach to that taken by the Seventh Circuit in *Carnegie. Stallings* held that a bankruptcy court's original discharge of a debt – when based on information provided by the debtor – constitutes sufficient acceptance of the debtor's position to provide a basis for judicial estoppel, even if the bankruptcy court "thereafter vacates and dismisses the debtor's bankruptcy after learning that the debtor was concealing claims." 447 F.3d at 1048 (citation omitted).

Pet. at 10.

The "(citation omitted)" from *Stallings* at the end of the foregoing quote in the Petition is somewhat disingenuous because the *Stallings* court cited to, and quoted from, *Hamilton v. State Fire & Cas. Co., supra,* for this proposition. In *Hamilton*, the Ninth Circuit flexibly applied the doctrine of judicial estoppel to preclude a debtor's subsequent suit when the claim had not been scheduled as an asset *even though* the discharge was later vacated and the bankruptcy dismissed. 270 F.3d at 784. Thus, Petitioner here is quoting from an Eighth Circuit decision that

implies an application of the judicial estoppel doctrine which Petitioner contends is contrary to the rule in the Ninth Circuit; and a Ninth Circuit case, the citation to which is conveniently omitted, is relied on by the Eighth Circuit as having actually applied judicial estoppel in that very fashion.

There is no split, sharp or otherwise, among the circuits as Petitioner suggests, and Petitioner's argument – particularly in its reliance on *Stallings* while "omitting" the citation to *Hamilton* – is, again, somewhat disingenuous (and misleading).

C. Petitioner's Argument on the Merits Is Unavailing.

Petitioner finally argues that, despite judicial estoppel being a discretionary equitable doctrine, the Ninth Circuit's decision in this case is both "clearly" and "plainly incorrect." Pet. at 12. Apparently, Petitioner is suggesting – without actually saying – that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. *See* Sup. Ct. R. 10. More likely, in light of the total lack of support for any such contention, Petitioner is merely suggesting, albeit with righteous indignation, that the Ninth Circuit misapplied the properly stated rule of law with respect to judicial estoppel (given that the Seventh, Eighth and Ninth Circuits are in harmony in that regard). If so, such an argument rarely presents a basis on which this Court will grant certiorari, *id.*, and it should not here.

The bankruptcy court explained in painstaking detail in its August 22, 2003 decision after trial on the merits

why this was not a proper case for application of judicial estoppel. Pet. App. at 21a-23a, 35a-36a. In fact, the bankruptcy court concluded that Respondent's complaint did not even embrace a "mutual mistake" theory, *id.* at 36a, thus agreeing with Respondent that Petitioner has mischaracterized Respondent's prior position. Implicit in these findings was a conclusion by the bankruptcy court that the alternative theory pursued at trial by Respondent in this complex, commercial dispute, with fair notice to Petitioner and express approval of the court, did not threaten judicial integrity. Exercising its discretion, the bankruptcy court, after full analysis, declined to apply judicial estoppel on the facts of this case. That decision was affirmed by the district court and the Ninth Circuit. There is no basis or reason for this Court to review that outcome.

CONCLUSION

Petitioner has not established a compelling reason for this Court to grant a writ of certiorari. Therefore, Respondent requests that the Petition be denied.

Respectfully submitted,

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